UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAROLYN WITT,

Plaintiff,

v. **Civil Action No. 3:15cv386-REP**

CORELOGIC SAFERENT, LLC, and
CORELOGIC NATIONAL DATA BACKGROUND, LLC

Defendants.

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER ON POTENTIALLY PRIVILEGED DOCUMENTS

Defendants, CoreLogic SafeRent, LLC ("SafeRent") and CoreLogic National Background Data, LLC ("NBD," and collectively, "Defendants"), by counsel, for their reply memorandum in support of their Motion for a Protective Order on Potentially Privileged Documents, state as follows.

INTRODUCTION AND PROCEDURAL HISTORY

The relief requested by Defendants is as straightforward as it is justified. Defendants seek the ability to log any additional documents that arise out of the resolution of their ongoing meet and confer efforts as to four email requests. As part of those efforts, Defendants have logged all documents that they have located to date. Defendants are not actively withholding or aware of other documents responsive to the email search that are privileged. However, because Plaintiff has not yet agreed to reasonable search terms and has kept the meet and confer effort open as to the emails requests, this timely Motion was necessary.

I. The procedural history preceding this Motion.

On the very last day of the deadline to serve written discovery – and after the production of more than 120,000 pages of documents (including emails), databases of hundreds of millions of records, more than a hundred pages of interrogatory answers – Plaintiff served four discovery requests[1] that seek every "email" between Defendants that contained one of multiple generic words (*e.g.*, "employment") without making any attempt to tailor those requests to any issue in this case. Defendants believe that the requests as stated cannot pass muster under any credible reading of Rule 26(b) and its related limitations regarding the discovery of electronically stored information ("ESI").

The first meet and confer on these requests occurred at the courthouse just days after their service, on March 6, 2017. At that meet and confer, after being presented with an initial report showing that even a partial production under their proposed search terms would require a review of more than 350,000 emails, *see* **Exhibit A** (presented to counsel for Plaintiff at the March 6 meeting), Plaintiff's counsel agreed that their four requests for emails would be limited to three substantive topics across various custodians and time periods. (*See* Defs' Mem. at Ex. B.)[2] That agreement was promptly memorialized in a March 8, 2017 letter. *See id.* However, Plaintiff's counsel would not agree to revise the generic proposed search terms, instead insisting that the meet and confer remain open in that regard while additional information and data was gathered by Defendants in light of that discussion.

In the interim, Plaintiff's counsel agreed that Defendants would have no obligation to serve a privilege log until the time that their responses were due (March 30, 2017). (*See* Defs' Mem. at Ex. E.) Defendants also served timely objections that conformed to the agreements

[1] Request for Production Nos. 18 and 19 to NBD and Request for Production Nos. 21 and 22 to SafeRent.
[2] As noted in Defendants' opening brief, those topics included: (1) responsive emails from its operations team that "discuss the application of the FCRA to NBD's activities;" (2) emails from the legal department "that discuss the application of the FCRA to NBD's sale of criminal record data, including the application of Section 1681k(a)"; and (3) emails from the legal department "regarding the FCRA-related provisions of [NBD's] customer contracts." *Id.*

reached at the March 6, 2017 meet and confer session, which further noted the ongoing nature of the meet and confer session as to the four requests targeting emails.

As discussed with the Court on the March 27, 2017 conference call, Defendants agreed to provide Plaintiff with statistics of the proposed search terms in light of the new custodians identified once all of the additional data files had been gathered. Defendants did so the next day, noting that Plaintiff was now seeking the review of over 600,000 emails and attachments, which would consume more than 20,000 hours of attorney review. Shortly after the March 6, 2017 meet and confer session, Defendants also conducted a sample review of 700 emails implicated by the search terms proposed by Plaintiff, which revealed no responsive documents. Plaintiff was informed as such. Throughout this process, Defendants also proposed alternative search terms that would require the review of more than 10,000 documents, but which were at least designed to discover responsive information in light of the identified topics. (Defs' Mem. at Exs. C-E.) Even still, Plaintiff would not agree. In light of that ongoing disagreement, Defendants asked Plaintiff if she would agree to extend the deadline for service of a privilege log until a date certain after search terms were agreed or the Court resolved the issue. Plaintiff would not agree, and this Motion followed that same day.

II. The extensive email review conducted – and being conducted – by Defendants.

Since the filing of this Motion, and in light of the positions taken by Plaintiff, Defendants executed the review of the more than 10,000 emails implicated by the search terms that they had proposed. That review consumed hundreds of hours across a team of sixteen attorneys. That review resulted in the production of eleven documents that related to the substance of the agreed-upon categories of emails coming out of the March 6 meeting. That review also resulted in a privilege log of five additional documents regarding internal discussions by the legal department on potential revisions to NBD's form of customer agreement with its background screening clients. (*See* **Exhibit B**.) That limited volume is consistent with what Defendants have previously represented to Plaintiffs; that there are scant documents within the identified time periods regarding the issues that they continue to seek to discover, which is not surprising in light of the indisputably novel claims being asserted.

Regardless, in a further effort to resolve this issue, coming out of the in-person April 19, 2017 meet and confer session, Defendants have offered to re-review the entire set of more than 10,000 documents to again determine if there are any relevant documents. Defendants have also proposed additional search terms implicating tens of thousands of additional emails that they have offered to review to try and move past this issue.

ARGUMENT

Plaintiff has filed an opposition that is both confusing and confused. Despite the ongoing dialogue between the parties and the Court on these issues, as well as the filing of a motion for a protective order prior to the time that its privilege log was due, Plaintiff claims that somehow privilege has been "waived" and that "good cause" is absent to grant Defendants this exceedingly-modest and sensible relief. Indeed, it is not even clear what Plaintiff would have proposed Defendants do as an alternative. What is clear, however, is the fact that Plaintiff evidently believes that she should be able to propound unbounded, overbroad, and indisputably burdensome discovery requests at the very end of a discovery period and then claim that any privilege has been "waived" across hundreds of thousands of documents for new substantive topics, regardless of the good-faith efforts of the responding party.

Plaintiff can, of course, cite no case that would grant her relief along the lines of what she has requested. Defendants' Motion should be readily granted. And, in light of the extensive efforts they have taken at the end of this discovery period (*i.e.*, the expenditure of hundreds of attorney hours already on this issue in an attempt to find documents that do not exist), as well as their recent offer to undertake additional ESI reviews across tens of thousands of additional emails, nothing further should be required and Defendants should be permitted to log, as appropriate, privileged documents arising out of any further review of emails.

I. Defendants have procedurally preserved the ability to serve a privilege log.

Defendants seek nothing more than an extension of time to serve any further privilege log with respect to facially-unbounded email requests implicating over 600,000 emails, which themselves are the subject of ongoing meet and confer efforts regarding search terms. Those efforts were brought to the attention of the Court prior to the filing of this Motion, and Defendants have now affirmatively raised the issue through formal motions practice. This is a paradigm instance of where the ability to serve a privilege log has been preserved.

Courts nationwide have recognized the general rule – as clearly delineated in Fed. R. Civ. P. 26(b)(5) – that a privilege log is required *only* for those documents requested that are "otherwise discoverable." *See* Fed. R. Civ. P. 26(b)(5) (privilege log required "[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material"); *Tumbling v. Merced Irrigation Dist.*, 262 F.R.D. 509, 518 (E.D. Cal. 2009) (same); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 2008 U.S. Dist. LEXIS 86594, at *40-41 (S.D.N.Y. Oct. 22, 2008) ("Plaintiff's discovery requests had been timely opposed by very serious objections based on over-breadth . . . . [U]ntil I ruled on the over-breadth objections, Defendants were not obligated to log each document."). *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212-13 (D.D.C. 2006) (same); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 621 (D.C. Cir. 2003) (same).

The plain text of the Rule confirms that "there is no obligation to assert a privilege for documents that are not within the scope of a request or that are outside of the scope of what could permissibly be requested." *ASPCA*, 233 F.R.D. at 212-213. Plaintiff fails to cite *any* authority contradicting that common-sense principle. Certainly, that general rule is subject to modification. For instance, as cited by Plaintiff, absent agreement or a timely motion by a party, this Court requires a privilege log to be produced at the same time as the party's objections. Yet, based on the ongoing meet and confer efforts between the parties, Plaintiff agreed to the extension of a privilege log here until the time that responses to the email requests were due, and this timely Motion was filed before that time period elapsed. (Defs' Mem. at Ex. E.) Thus, privilege has been fully preserved consistent with this Court's Orders and accepted practices within the United States District Court for the Eastern District of Virginia. Defendants did exactly as they were supposed to do by moving the Court for relief.

Plaintiff's procedural argument, therefore, appears to be an attempt to claim "surprise" as to the assertion of privilege. (Pltf's Opp. at p. 2.) Plaintiff claims that "at no time during either [in-person meet and confer] conference did Defendants raise the issue in the present motion." *Id.* Of course, Plaintiff cannot claim to be surprised that Defendants would seek to assert privilege when Plaintiff's counsel revealed on March 6, 2017 that the four email requests actually target members of the *legal department*. And, in the March 8, 2017 letter memorializing the meet and confer session, Defendants stated that they would "log responsive documents" with respect to Category No. 2 for the legal department, and that "[a]fter agreement on search terms, NBD will log/produce responsive documents regarding the FCRA-related provisions of its customer contracts" with regard to Category No. 3, also targeted towards the legal department. (Defs' Mem. at Ex. B.) Even more, before objections were due, Defendants secured agreement from Plaintiff that any obligation to serve a privilege log would be deferred.[3] (*See* Defs' Mem. at Ex. E.) Further, and consistent with those prior representations, Defendants noted in their objections that the meet and confer on the four email requests remained open among the parties, and that "privilege" was preserved to the extent that the agreed-upon search terms yielded privileged material. (*See* Pltf's Opp. at Ex. 1; Ex. 2.) Defendants have thus "expressly ma[de] the claim" of privilege in the manner envisioned by Rule 26(b). There can be no surprise of the request to serve a privilege log in this context.

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[3] If Plaintiff had not so agreed, this Motion would have simply been filed at that time, as opposed to the time that responses were due.

Plaintiff's argument also fundamentally misses the mark. Defendants are not standing on a privilege objection, such that the cases cited regarding the sufficiency of a privilege objection would be germane. Defendants have agreed to log responsive, privileged documents. Defendants have simply moved for leave to file any further log after the remaining issues as to burden, proportionality, and relevance are resolved with respect to the email requests. The dispute is not privilege related. It is procedural. In sum, Plaintiff's inapposite arguments provide no basis for denying Defendants the ability to serve a privilege log. *See Tumbling v. Merced Irrigation Dist.*, 262 F.R.D. 509, 518 (E.D. Cal. 2009) (denying motion to compel documents that plaintiff claimed were improperly logged as privileged, because defendant should have an opportunity to update the privilege log after the court ruled on objections related to overbreadth and relevance).

II. There is eminent "good cause" for this common sense relief.

Plaintiff also claims that there is not "good cause" to grant the requested relief, and she further claims that the proportionality burden and relevance objections to reviewing hundreds of thousands of emails were "insufficiently detailed." (Pltf's Opp. at pp. 7-12.) Not so.

At the first meet and confer session on March 6, 2017, Plaintiff was presented with concrete evidence that her generic and improper search terms yielded a universe of more than 350,000 emails based on the data currently collected by Defendants. *See* Ex. A. Thereafter, Plaintiff has been consistently presented with evidence that her search terms would yield many hundreds of thousands of documents requiring a review of privilege and relevance. (*See* Defs' Mem. at Exs. C-E.) She was also informed in mid-March of the results of the 700-document sample review conducted by Defendants, which revealed that her terms produced ***no responsive documents***. She also has now been provided with the results of an additional 10,000 document email review, as well as Defendants' offer to do even more.

It is difficult to imagine a situation where the burdens sought to be imposed by a plaintiff are more obvious and the actions of a defendant have been more expedient and transparent. Indeed, none of the cases cited by Plaintiff, where unsubstantiated claims or burden were asserted, have any relation to these facts, where substantial diligence has been undertaken by Defendants, including their execution of an additional email search as to search terms that do actually relate to the claims in this case. Plaintiff also obscures the fact that she provides *no justification* for seeking any email discovery beyond the broad search terms that have already been executed by Defendants, which resulted in an exceptionally low percentage of responsive materials. Plaintiff makes no attempt to dispute the enormous burdens that she seeks to impose on Defendants for no apparent purpose. Her statements that "the mere fact that discovery requires work and may be time consuming" are devoid of substance. (Pltf's Opp. at p. 8.) And, Defendants have now already spent hundreds of hours on this effort and taken every reasonable step to resolve the issue.

III. There has been no "waiver" of privilege.

Plaintiff, in a last ditch effort to manufacture a privilege conflict, claims that Defendants' Motion should be denied as moot pursuant to the Court's December 14, 2016 Order because "the documents Defendants now seek to log were earlier requested in previous rounds of discovery." (Pltf's Opp. at pp. 1-2.) This argument fails.

As an initial matter, clarity and fuller context is warranted. On January 16, 2017, in the context of a broader production of hundreds of emails and many thousands of pages of additional documents, Defendants served a privilege log listing eight documents that were identified during Defendants' discovery efforts (including as to emails) as a result of the Court's December 16, 2016 Order on Plaintiffs' Motion to Compel. Defendants also moved the Court to accept that privilege log. (*See* Dkt. Nos. 146, 148.) Plaintiff accepted that privilege log and agreed that privilege had been appropriately asserted with respect to that discrete document set. (*See* Dkt. Nos. 151, 152.) The Court, therefore, denied the motion as moot and also accepted the log as properly served. (*See* Dkt. No. 153.)

Plaintiff then lodged the four, new requests for "emails" on the last possible day of the supplemental discovery period. Those requests, while improper on their face, were new.[4] A meet and confer process then ensued whereby Plaintiff agreed to substantively limit her requests to three narrowed issues. As discussed above, Defendants then executed a review of the more than 10,000 documents using more targeted search terms, and they identified five relevant, privileged communications. Each of the five documents relates to communications with legal-department custodians regarding contract drafting with respect to NBD's form of contract. (*See* Ex. B.) Consequently, Defendants simply seek to log ***those five documents*** while the meet and confer process remains open as to email discovery.

Turning to the arguments advanced by Plaintiff, she claims that emails from NBD's custodians were previously sought under Requests Nos. 14, 34, and 35 and were thereafter compelled by the Court's December 14, 2016 Order. That is incorrect. Request No. 14 sought "marketing, sales, or other promotional material." Documents in that regard have been produced, and those materials are not privileged. Those marketing materials also have no relation to the three substantive categories identified by Plaintiff on March 6, 2017.

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[4] The service of new discovery requests, in and of itself, presumptively shows that Plaintiff's requests are not "old" or encompassed by past requests.

Likewise, Request No. 35 sought "all communications . . . between NBD and any of its subscribers." Again, those communications would not be privileged and are not implicated by this Motion. They also do not intersect with the topics identified by Plaintiff on March 6, 2017. Defendants have also produced documents in those regards that have been located to date.

Request No. 34[5] sought documents "evidencing NBD's FCRA compliance procedures or any changes thereto since June 2010." Any such identified communications were properly produced or logged on January 16, 2017. Indeed, despite committing hundreds of additional hours to an additional email review this past month, no additional privileged documents relating to Request No. 34 have been located. The additional five privileged emails identified by Defendants on the April 11, 2017 log relate to internal discussions regarding potential revisions to NBD's contracts with background screening companies.[6] (*See* Ex. B.) Those documents fall outside of Request No. 34, which regards NBD's "procedures" or any "changes" thereto since 2010. Simply put, Defendants are aware of no additional relevant or privileged emails that fall outside of the privilege logs previously served with respect to the substance of Request No. 34. The only possible further documents that could exist with to Request No. 34 are needles in a 600,000 email haystack caused by Plaintiff's overbroad requests, which are themselves improper and not proportional under the Federal Rules of Civil Procedure.[7]

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[5] Notably, Request No. 34 was not referenced in Court's subsequent December 14, 2016 Order, by which Plaintiff seeks to create a "waiver" of privilege.

[6] NBD's form of contract with its background screening customer clients remained unchanged during the relevant time period implicated by the four new email requests.

[7] Indeed, Plaintiffs' process would encourage litigation gamesmanship whereby parties would lodge incredibly overbroad discovery requests based on nothing more than search terms at the end of a discovery period and seek waiver of privilege as to any prior requests.

IV. Email discovery should end in this case based on Defendants' efforts.

Defendants' discovery efforts in this matter – particularly with respect to ESI – have been comprehensive and beyond proportional to the FCRA claims and allegations in this case. For Defendants' January 16, 2017 production alone, Defendants logged a total of more than 800 review hours. Hundreds of emails were produced. That review also identified eight privileged documents, which were properly logged. Defendants have further produced two copies of NBD's Results Returned Database, as well as a full copy of SafeRent's massive Multistate Database. Even more, tens of thousands of pages of documents from all of NBD's client files were made available for on-site inspection at NBD's offices and have been inspected.

For this new set of requests, Defendants engaged a team of sixteen attorneys to perform an expedited review of more than 10,000 additional documents. That review resulted in fifteen responsive documents. Five of those documents were logged as privileged. The lack of responsiveness as to Defendants' proposed search terms, which were narrower than Plaintiff's broad terms, foretells the very low quality of the terms that Plaintiff seeks and dictates that no further ESI review should be required. Defendants' protocols and procedures were also standard for ESI production. The Federal Rules provide that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(b). And, based on the circumstances of "a particular case, these burdens and costs may make the information . . . not reasonably accessible." Rule 26 Official Note to 2006 Amendment. Pursuant to these standards, Defendants have done all that is required of them here and more.

That is not the end of Defendant's efforts, however. The parties again met and conferred in person on April 18, 2017, including to discuss ESI issues. At the session, Plaintiffs' counsel expressed concern over the low volume of hits as to the review. In light of that concern, Defendants have now offered to re-review the more than 10,000 documents for relevance determinations using a small team of Troutman Sanders, LLP attorneys. Defendants also offered to expand the targeted search terms that are being utilized with respect to the "operational" custodians for NBD with respect to the three-year period prior to the filing of the related *Henderson* action, which will increase the size of review of emails by tens of thousands of additional emails. Defendants have pledged to then produce or log documents meeting the agreed-upon substance of the ESI review, as appropriate.

Defendants have gone above and beyond in this case to produce documents responsive to Plaintiff's requests, even when such requests have little to no relation to the claims in this case. A firm schedule has been set by the Court. Defendants respectfully request that the Court allow the case to progress to a decision on the merits. No further ESI discovery is warranted.

CONCLUSION

WHEREFORE, Defendants, CoreLogic SafeRent, LLC and CoreLogic National Background Data, LLC, request that the Court enter an order: (1) granting their Motion for Protective Order; (2) staying any requirement that Defendants further identify on their privilege log any documents to which Defendants have objected to producing until further order of the Court or agreement between the parties as to search terms and the deadline for response; and (3) awarding Defendants such other relief as the Court may deem proper.

CORELOGIC SAFERENT, LLC and CORELOGIC NATIONAL DATA BACKGROUND, LLC

By: /s/ H. Scott Kelly

Alan D. Wingfield (VSB No. 27489)
David N. Anthony (VSB No. 31696)
Timothy J. St. George (VSB No. 77349)
H. Scott Kelly (VSB No. 80546)
TROUTMAN SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1200
Facsimile: (804) 698-1339
alan.wingfield@troutmansanders.com
david.anthony@troutmansanders.com
tim.stgeorge@troutmansanders.com
scott.kelly@troutmansanders.com

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

Leonard A. Bennett, Esq.
Susan M. Rotkis, Esq.
CONSUMER LITIGATION ASSOCIATES, P.C.
763 J. Clyde Morris Blvd, Suite 1A
Newport News, VA 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: len@clalegal.com
Email: susy@clalegal.com

Dale W. Pittman, Esq.
THE LAW OFFICE OF DALE W. PITTMAN, P.C.
112-A West Tabb St.
Petersburg, VA 23803
Telephone: (804) 861-6000
Facsimile: (804) 861-3362
Email: dale@pittmanlawoffice.com

James Arthur Francis, Esq.
David A. Searles, Esq.
Francis & Mailman PC
100 S Broad Street, 19th Floor
Philadelphia, PA 19110
Telephone: 215-735-8600
Facsimile: 215-940-8000
Email: jfrancis@consumerlawfirm.com

Counsel for Plaintiff

/s/ H. Scott Kelly
H. Scott Kelly
Virginia State Bar No. 80546
TROUTMAN SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1200
Facsimile: (804) 698-6013
Email: scott.kelly@troutmansanders.com